No. 81-6854



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

FREDDIE DAVIS,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

# BRIEF IN OPPOSITION FOR THE RESPONDENT

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## QUESTIONS PRESENTED

1.

Whether the addition of a new aggravating circumstance at Petitioner's resentencing trial did not amount to a double jeopardy violation.

2.

Whether the actions by the Supreme Court of Georgia on remand from this Court were proper.

3.

Whether the jury instructions at the second sentencing trial properly instructed the jury as to its consideration of the death penalty.

4.

Whether statements made by the Petitioner were properly admitted at trial.

5.

Whther Petitioner received effective assistance of counsel at trial.

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## PART ONE

## STATEMENT OF THE CASE

Petitioner, Freddie Davis, was indicted in Meriwether County, Georgia, for the rape and murder of Frances Coe. Eddie Spraggins was also indicted and convicted of this offense. Petitioner was tried by a jury and found guilty of both offenses. At Petitioner's original trial in 1977, he was sentenced to life for rape and to the death penalty for the offense of murder based on a finding of Ga. Code Ann. § 27-2534.1(b)(2).

On direct appeal to the Supreme Court of Georgia, Petitioner's convictions for murder and rape, as well as the life sentence for rape were affirmed. Davis v. State, 240 Ga. 763, .43 S.E.2d 12 (1978). The Supreme Court of Georgia determined that the trial court's sentencing instructions did not fully explain the consideration of the death penalty to the jury. Thus, the Georgia Supreme Court reversed the death penalty for the offense of murder

and ordered a new trial on the issue of punishment.

A new jury was selected in Meriwhether County and the State presented the same evidence as had been presented in the original trial. At this second sentencing trial, the State sought the death penalty based on Ga. Code Ann. §§ 27-2534.1(b) (2) and (7). The jury once again imposed the death penalty and found that both of the statutory aggravating circumstances existed beyond a reasonable doubt.

The case was again presented to the Supreme Court of Georgia on direct appeal from the resentencing hearing. The Supreme Court of Georgia considered the sentence and affirmed the sentence as found by the trial court. Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979). Petitioner subsequently filed a petition for a writ of certiorari in this Court challenging that decision. On May 27, 1980, this Court ordered that the judgment of the Supreme Court of Georgia be vacated insofar as it left the death penalty undisturbed and remanded the case to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980).

On remand, the Supreme Court of Georgia again affirmed Petitioner's death sentence. The Court found that there was sufficient evidence to support a finding beyond a reasonable doubt of the seventh aggravating circumstance and also noted that the death sentence could be upheld upon the finding of the second aggravating circumstance. Davis v. State, 246 Ga. 432, 271 S.E.2d 828 (1980). Petitioner again filed for a petition for a writ of certiorari in this Court. This petition was denied on April 20, 1981 and a rehearing was denied on June 1, 1981. Davis v. Georgia, ___U.S.___, 68 L.Ed.2d 312 (1981).

A petition for a writ of habeas corpus was filed in the Superior Court of Butts County in July, 1981. A hearing was held on the petition on October 1, 1981. After briefs were filed by counsel for both parties, that Court denied habeas corpus relief on February 5, 1982. An application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on March 24, 1982. An application for rehearing was also denied by that Court.

Petitioner has now filed the instant petition for a writ of certiorari in this Court challenging the decision by the habeas corpus court.

## PART TWO

## REASONS FOR NOT GRANTING THE WRIT

### I. THE ADDITION OF A NEW AGGRAVATING CIRCUMSTANCE AT PETITIONER'S RESENTENCING TRIAL DID NOT AMOUNT TO A DOUBLE JEOPARDY VIOLATION.

Petitioner has asserted that his rights under the double jeopardy clause have been violated by the addition of a second aggravating circumstance at his resentencing trial. In support of this allegation, Petitioner cites to the decision of this Court in Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852 (1981).

In the instant case, Petitioner was first tried in 1977. At that time only one aggravating circumstance was presented to the jury for its consideration. The jury found the existence of this aggravating circumstance and imposed the death penalty. At the resentencing hearing, the state again sought the death penalty based on this aggravating circumstance and added the seventh aggravating circumstance. No new evidence was presented by either party at that time. The jury then returned a finding of both aggravating circumstances and imposed the death penalty. Respondent submits that under these circumstances, Petitioner's rights under the double jeopardy clause were not violated.

This same issue has been considered by the Supreme Court of Georgia in two other cases and was addressed by the state habeas corpus court in this case. See Zant v. Redd, 249 Ga. 211, ___S.E.2d ___ (1982); Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981). In both of those decisions the court considered

the application of this court's decision in Bullington v. Missouri, to cases in which additional aggravating circumstances are presented at a second trial.

In Godfrey the defendant had initially been convicted of murder and received the death penalty based upon the jury's finding of the existence of the seventh aggravating circumstance. After reversal by this Court, the jury was allowed to consider the second aggravating circumstance on resentencing and returned a finding of the death penalty. On appeal, the Supreme Court of Georgia considered the double jeopardy issue and determined that the state was not limited to the aggravating circumstances relied upon at the first sentencing trial. The court specifically noted that the failure to submit aggravating circumstances was not in any manner an implied directed verdict of acquittal on those circumstances. This Court denied certiorari in that case on April 5, 1982 and denied rehearing on May 24, 1982.

In Zant v. Redd, an additional aggravating circumstance was presented to the jury on resentencing. The Supreme Court of Georgia considered again the decision in Bullington by this Court and determined that there was no double jeopardy violation presented.

In considering the decision in Bullington v. Missouri, it appears that the basis of this Court's holding is that the procedure used under Missouri's death penalty statute closely resembles that of a trial on guilt or innocence. This Court indicated that this sentencing procedure required the jury to determine if the state had actually proved its case when seeking to impose the death penalty. Thus, a sentence of life in that case actually amounted to an acquittal of the death penalty.

Respondent asserts that, as found by the Supreme Court of Georgia, this reasoning does not apply to aggravating circumstances. There is no alternative process in the jury's consideration of aggravating circumstances. Under the statute in Georgia, there is only a requirement that the jury find one aggravating circumstance in order to impose the death penalty. Ga. Code Ann. § 27-2534.1(c). Zant v. Redd at 213. In the instant case, the jury was so instructed. Thus, the decision by the jury is not a mutually exclusive one as it is with regard to the choice of life or death. Thus, it cannot actually be said that the failure of the jury to find a particular aggravating circumstance is an acquittal. Further, under Georgia law, the state and defense start anew at a resentencing hearing. Therefore, the state is not limited to the aggravating circumstances relied upon at the first hearing. Godfrey v. State at 619. In that case, the Supreme Court of Georgia found that under Georgia law, the failure to submit aggravating circumstances is not an implied directed verdict of acquittal on these circumstances.

Thus, Respondent asserts that, even under the holding of this Court in Bullington, supra, there has been no implied directed verdict of acquittal on the aggravating circumstance not submitted to the jury at the first sentencing proceeding. Therefore, there was no error in submitting a new aggravating circumstance at the resentencing proceeding. This does not constitute a double jeopardy violation as there is no requirement that the jury make a specific finding as to the presence or absence of a particular aggravating circumstance as long as the jury finds the presence of one aggravating circumstance. Therefore, Respondent asserts that there is no constitutional issue presented by this allegation.

Petitioner also indicates that this issue should be considered in light of this Court's consideration of the case of Zant v. Stephens, 50 U.S.L.W 4472 (May 3, 1982). This case is clearly distinguishable from that case. In Stephens, the Court is faced with a consideration of the effect of a finding that one statutory aggravating circumstance found by the jury is unconstitutional. As Respondent has previously shown that no double jeopardy violations were presented, there is clearly no issue presented similar to the Stephens case.

## II. THE ACTIONS BY THE SUPREME COURT OF GEORGIA ON REMAND FROM THIS COURT WERE PROPER.

Petitioner challenges the actions of the Supreme Court of Georgia when it considered the Petitioner's sentence after remand from this Court. This Court had remanded the case for reconsideration in light of Godfrey v. Georgia, supra. See Davis v. Georgia, 446 U.S. 961 (1980). On remand the Supreme Court of Georgia did not take additional argument or briefs, but merely reconsidered the record before it. The court determined that the death penalty was proper and reaffirmed the death sentence. The Petitioner complains that the Supreme Court of Georgia should have ordered a new jury trial on the issue of sentence and was not authorized to act as a de novo sentencing authority. It should be noted that the issues encompassed in this allegation were raised in the petition for a writ of certiorari to this Court following the decision by the Supreme Court of Georgia.

Under Ga. Code Ann. § 27-2537, the Supreme Court of Georgia is directed to conduct an appellate review of the sentence imposed by the trial court. The court is given specific areas in which it must evaluate the sentence. The court is then authorized, among other alternatives, to affirm the sentence of death. Ga. Code Ann. § 27-2537(e)(1). On its first review of the death penalty imposed at the resentencing trial, the Supreme Court merely noted that both of the aggravating circumstances were supported by the evidence. Davis, 242 Ga. at 908. The court did not set forth a detailed examination of the aggravating circumstances. This Court did not reverse the death penalty, but merely remanded the case for additional review by the Supreme Court of Georgia. Therefore, on remand the Supreme Court of Georgia was only conducting its appellate review under Ga. Code Ann. § 27-2537. The court did not reimpose the death sentence, but merely reaffirmed the death sentence previously imposed by the Superior Court of Meriwether County. As the court was merely conducting its appellate review, there was no requirement that the court send the case back for a new jury sentencing procedure. Furthermore, as the court was only considering the record before it on an issue previously addressed, there was no requirement that the court allow additional briefs to be filed.

## III. THE JURY INSTRUCTIONS AT THE SECOND SENTENCING TRIAL PROPERLY INSTRUCTED THE JURY AS TO ITS CONSIDERATION OF THE DEATH PENALTY.

Petitioner asserts that the jury instructions in the instant case were incomplete and did not instruct the jury properly as required by this Court under Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982).

The court began its charge by stating that the law provides for a trial judge to instruct the jury concerning any evidence in extenuation, mitigation and aggravation. (T. 354). The court told the jury that they were authorized to consider all of the evidence presented in open court. The court specifically charged the jury, "In reaching your verdict, you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether mitigating circumstances exist, you are authorized to consider all of the evidence produced by the state and the defendant throughout this trial." (T. 355). The court specifically instructed the jury to consider all of these factors in determining if there was mitigating evidence. The court went on to charge the jury as follows:

> Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime, but which may be considered as extenuating or reducing the morale [sic], culpability or blame.

> In reaching this verdict, you are not required to find mitigating circumstances in order to recommend a sentence of life imprisonment. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case.
>
> Ladies and Gentlemen of the jury, I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory aggravating circumstances as I will define to you later in this charge, sufficient to authorize the supreme penalty of law. (T. 355-6).

The Court then went on to charge as to the specific aggravating circumstances presented and told the jury that if they found that the state had proved one of the statutory aggravating circumstances beyond a reasonable doubt, they could recommend a death penalty, but were not required to do so. (T. 358).

Based on the foregoing, it is clear that the charge as given to the jury does not have any of the constitutional deficiencies alleged by the Petitioner. It is not required under Georgia law that specific mitigating circumstances be set forth. The jury was clearly charged that they were to consider all facts and circumstances presented. Furthermore, the jury would clearly have that understanding as the only purpose served by this jury was to make a determination as to sentence. The jury, thus, certainly understood that all

evidence presented to it was to be used in determining whether or not the death penalty was appropriate.

Petitioner asserts that the recent decision of the Fifth Circuit Court of Appeals in Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), requires that a court set forth examples of mitigating circumstances for the jury to consider. A close reading of that decision clearly shows that no such finding was made by the court. As a matter of fact, the court specifically noted in a footnote that it did not decide whether a trial court was required to identify particular mitigating circumstances. Id., 661 F.2d at 469, n. 3. No finding has ever been made by a court requiring that specific mitigating instructions be enumerated. The only requirement is that the jury know that they are allowed to consider any evidence presented in mitigation.

It is clear from the instant charge that the court did define mitigating circumstances to the jury and explained the term sufficiently for the jury's consideration. Thus, there is no constitutional issue presented for review by this Court.

## IV. STATEMENTS MADE BY THE PETITIONER WERE PROPERLY PRESENTED AT TRIAL.

Petitioner complains of the admission of statements at trial that he had made to the authorities. He asserts that his Miranda rights were violated concerning these statements, in particular asserting that he was not advised of his rights prior to the first two statements and that there was no showing that the third statement was voluntary.

On the initial direct review of Petitioner's conviction, the Supreme Court of Georgia considered Petitioner's allegation that his third statement was improperly admitted. The Court determined that there was no merit to Petitioner's allegation that he did not know the nature of the crime for which he was under arrest at the time of making this statement. On review of Petitioner's case after resentencing, the Court again considered the admissibility of the statements. The court specifically found that the Petitioner was not in custody when the first two statements were made, and these statement were properly admitted at trial. Davis v. State, 242 Ga. at 904. Miranda comtemplates a custodial interrogation type of situation before there is any requirement that these warnings be given. As the Supreme Court of Georgia made a proper factual finding that there was no custodial interrogation at the time of the making of these two statements, there was no requirement that the Miranda warnings be given.

A Jackson v. Denno hearing was held at trial and the Supreme Court of Georgia consider this hearing when determining the admissibility of the third statement. The Court found that the factual findings made by the trial court were supported by the evidence and that the statement was properly admitted. The facts in this case clearly support a finding that the statement was

freely and voluntarily made by the Petitioner after a knowing relinquishment of his constitutional rights. In considering the totality of the circumstances, it is apparent that this statement was properly admitted at trial. See Clewis v. Texas, 386 U.S. 707 (1967) and Lego v. Twomey, 404 U.S. 477 (1972). Thus, Respondent asserts that there is no federal constitutional question presented for review by this Court in this allegation.

## V. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Petitioner has asserted that he received ineffective assistance of counsel at trial due to his attorney's inability to adequately prepare for the case. Petitioner challenged this issue in the state habeas corpus court and it was decided adversely to him.

It is well recognized that effective assistance of counsel is considered to mean "not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." United States v. Gibbs, 662 F.2d 728 (11th Cir. 1981); MacKenna v. Ellis, 286 F.2d 592, 599 (5th Cir. 1970); Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974). In considering this allegation, it is necessary to have an overall view of the representation of the Petitioner by his trial counsel. Petitioner had indicated that he did not want a state appointed attorney and informed the trial court that he did not want the attorney appointed for him. Mr. Steve Fanning represented the Petitioner during the committal hearing in this matter. After problems arose concerning Mr. Fanning's fee, Petitioner's family retained Mr. Ted Schumacher to represent him. He was retained approximately seven days prior to trial.

Mr. Schumacher had been practicing law since 1971, including practice in the Army as a member of the Judge Advocate General Corps. During this time he participated in some 200 court martial cases. Mr. Schumacher had represented some 60 defendants in felony cases in the Georgia courts.

Counsel requested a continuance due to the time constraints placed upon him, but this was denied by the trial court. Mr. Schumacher met with the Petitioner two times prior to trial and talked with him about the offense, his history and life. Mr. Schumacher spent seven days and nights prior to the trial researching areas which were relevant to the trial including blood tests, hair tests, rape and evidence. He traveled to the crime scene and talked with various witnesses there. He made arrangements with Petitioner's family to gather as many witnesses as possible and then went and talked with these witnesses. Petitioner's co-defendant was tried during this time and Mr. Schumacher attended that trial. The evidence was generally the same at both trials. Mr. Schumacher further discussed the case with Steve Fanning.

Mr. Schumacher presented numerous witnesses on Petitioner's behalf at the first trial and continued to represent the Petitioner on direct appeal and at the second sentencing trial. He talked with the Petitioner prior to the second trial. He did not call any witnesses in mitigation at the second trial because the state had not called Petitioner's co-defendant. Mr. Schumacher used this as a trial tactic intended to catch the district attorney by surprise, as he felt that the district attorney was waiting to call the co-defendant in rebuttal. The district attorney was allowed to reopen his case and bring the co-defendant in to testify, but Mr. Schumacher felt that the co-defendant had made a bad witness. He felt that the witnesses available to testify for the Petitioner would not have had much effect at that time. His main concentration was in attacking the co-defendant's statement during his closing argument.

Mr. Schumacher indicated that his only concern was the amount of time he had to prepare for the case. In testifying at the state habeas corpus hearing, however, he indicated that he did not know any more that he could have done other than to perhaps perform better research in certain areas. He did testify that he was able to research those areas and could not give any specifics that he was unable to do in that length of time. It is clear from all of the above that Mr. Schumacher did conduct a thorough investigation of the case and provided reasonably effective assistance of counsel. No testimony was presented to show any evidence that Mr. Schumacher could have obtained had he been allowed extra time. Effective counsel need only have the opportunity to investigate the charges against a defendant. The time spent in a case and with a defendant alone is insufficient to show that counsel is ineffective. See Wilkerson v. United States, 591 F.2d 1046 (5th Cir. 1979). In the instant case, nothing has been shown which would indicate that counsel could have done any more in representing Petitioner had more time been provided him.

The state habeas corpus court considered all of the evidence and determined that counsel did not file a change of venue motion but did question jurors thoroughly about pretrial publicity. Counsel investigated the circumstances in which Petitioner's hand had been cut, but did not want to emphasize the fact that blood samples from the crime scene matched the Petitioner's blood type. He did not think it wise to get into the details of the cut on the hand as Petitioner got the cut from being involved in a knife fight several days before the murder.

Prior to trial counsel filed a motion for individually sequestered voir dire, although made a tactical decision to withdraw this motion due to the feelings of the people in the area. Counsel made an opening statement at the first trial, filed motions, presented ten witnesses during the guilt and innocence phase, including the Petitioner, gave closing argument and asked the jury to consider the Petitioner's testimony during the sentencing phase and presented closing argument. At the second trial, counsel presented an opening statement, thoroughly cross-examined state's witnesses, made several motions and gave a closing argument.

Under all of these facts, the state habeas corpus court found that Petitioner's counsel was effective and did present a proper defense for the Petitioner. Respondent asserts that Petitioner has shown no independent basis to justify a finding of ineffective assistance of counsel and urges this Court to decline to consider this issue.

## CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Freddie Davis.

Respectfully submitted,

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